

**UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD
REGION 8**

G. A. L. E. CONSTRUCTION, INC.¹

Employer

and

**OPERATIVE PLASTERERS' AND CEMENT
MASONS' INTERNATIONAL ASSOCIATION,
LOCAL UNION NO. 404²**

Petitioner

Case No. 8-RC-16335

and

**BRICKLAYERS AND ALLIED CRAFTWORKERS
LOCAL UNION NO. 16**

Intervenor

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held before a hearing officer of the National Labor Relations Board.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.³

¹ The name of the Employer appears as amended at hearing.

² The name of the Petitioner appears as amended at hearing.

³ The Petitioner filed a post-hearing brief that has been duly considered. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed, including his ruling to allow Bricklayers and Allied Craftworkers, Local 16 to intervene in this matter. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein. The labor organizations involved claim to represent certain employees of the Employer. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

The following employees of the Employer constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All full-time and regular part-time employees of the Employer engaged in cement mason work within the State of Ohio, including journeyworkers and apprentices, but excluding all office clerical employees and professional employees, guards and supervisors as defined in the Act and all other employees.

There are approximately nine employees in the unit found appropriate herein.

I. The Issues

There are two primary issues to be determined in this representational proceeding. The first is whether the unit must be limited geographically in order to be deemed appropriate. The Petitioner seeks a unit that includes all cement masons employed by the Employer at any and all job sites within the State of Ohio. The Intervenor asserts that the only appropriate unit would be one limited to Cuyahoga County in the State of Ohio. The Employer takes no position on this issue.⁴

The second issue is the voting eligibility of working foremen Anthony LaFlame and Wayne Remsel. The Intervenor asserts that they have duties and authority that would make them supervisors within the meaning of Section 2(11) of the Act. The Petitioner disputes that contention and urges that these individuals be found eligible to vote. The Employer takes no position on this issue.

⁴ No party directly raised the issue of contract bar in this matter. I note that the Employer is party to three multi-employer contracts covering the work of its cement masons in various counties throughout Northeastern Ohio. One is with the Petitioner, the second with the Intervenor and the third with Cement Masons Local 109 headquartered in Akron, Ohio (Following the close of the hearing, Local 109 submitted a letter declining to intervene or participate in this proceeding). In earlier decisions, including **Gash Concrete, 8-RC-16332** and **South Euclid Asphalt, 8-RC-16334**, I found the same contracts with Locals 404 and 109 to be Section 8(f) agreements. I also determined in these earlier decisions that the same contract with the Intervenor was a Section 9(a) agreement. I am satisfied that the same finding must be made regarding the three contracts at issue in this matter. Accordingly, the two 8(f) agreements do not serve as a bar to this petition. **John Deklewa & Sons, 282 NLRB 1375, 1387 (1987)**. As the petition was filed during 60 to 90 day window period of the Intervenor's contract, that agreement raises no bar issue either. **Leonard Wholesale Meats, 136 NLRB 1000(1962)**.

II. Decision Summary

I find that the petitioned for unit is appropriate and direct an election in that unit. I further find that LaFlame and Remsel are not statutory supervisors and are eligible to vote in the election directed herein.

III. Unit Scope

As noted above, the Petitioner seeks a unit of cement masons employed by the Employer within the State of Ohio. The Intervenor contends that an election should be directed only among those individuals employed within Cuyahoga County because that is the geographic area encompassed by the Employer's contract with the Petitioner.

The Employer is engaged as a concrete contractor from its facility located in Stow, Ohio. It employs cement masons, laborers and carpenters. It utilizes two full-time cement masons, LaFlame and Remsel, on all of its jobs. The Employer also employs a number of part-time masons on a recurring basis on many of its jobs, no matter where these are located. Additional masons are sometimes hired to supplement this core group. While the majority of the Employer's job sites are in Cuyahoga County, it also performs work in several other counties in Northeastern Ohio on a regular basis. It applies a number of different collective bargaining agreements to this work, depending on the county where the work is performed. Specifically, its contract with the Petitioner applies only to work performed within Cuyahoga County. Its contract with the Intervenor applies in Lake, Geauga and Ashtabula Counties. The contract with Cement Masons Local 109 applies in different counties in Northeastern Ohio. The Employer's Vice-President, Greg Zoldesy, testified at hearing that the only restriction it places on where it seeks work is one based on travel time.

When the Board has addressed the appropriate geographic scope of construction bargaining units, it has examined: (1) whether there is a core group of employees who travel from place to place, and (2) the history of where the core group has worked or reasonably foresees working in the future. **Alley Drywall, Inc., 333 NLRB No. 132 (2001)**; **Oklahoma Installation Co., 305 NLRB 812 (1991)**. Based upon the record evidence regarding this Employer's work practices, I find that the petitioned for unit, geographically limited to the State of Ohio, is an appropriate one.⁵ The evidence clearly establishes that the Employer utilizes a core group of cement masons at many or all of its jobs and that this work is frequently performed outside Cuyahoga County and throughout much of the state. There is no evidence that it will not continue to seek work outside Cuyahoga County in the future. The fact that the Employer's current agreement with the Petitioner is limited to Cuyahoga County is not determinative on this issue. The Board has repeatedly declined to rigidly define a unit in a representation proceeding based upon the scope of Section 8(f) agreements. **Dezcon, Inc., 295 NLRB 109 (1989)**, **Alley Drywall, supra.**⁶

V. Eligibility of LaFlame and Remsel

As noted, Tony LaFlame and Wayne Remsel are the two full-time cement masons that the Employer utilizes as core employees on all its jobs. The record indicates that they serve as working foremen, responsible for insuring that jobs are carried out in an

⁵ I note that the Intervenor indicted its willingness to participate in an election directed in a unit other than one limited to Cuyahoga County.

⁶ I decline to limit the unit geographically, to something greater than Cuyahoga County but less than statewide, for the following reasons. First, the Petitioner need only seek an appropriate unit, not one that might be deemed the most appropriate. **Overnite Transportation, 322 NLRB 723 (1996)**. Second, while the Employer does not now regularly perform work throughout the state, there is no basis in the record on which to conclude that it may not broaden its search for work in the future. Third, this record provides no factual basis for determining that some alternate unit, other than one of those sought by the parties, may be appropriate.

efficient manner. However, the record indicates that Zoldesy visits the work sites on a regular basis and exercises ultimate control over what happens on the job. The vast majority of LaFlame's and Rensel's work time is spent performing cement masons' work. They do not have any authority as to how jobs are scheduled or which employees are assigned to a particular job. There is no evidence in this record that LaFlame and Rensel have any authority to assign overtime to employees or to allow employees to come to work late or leave early. They cannot fire or discipline employees.

While Zoldesy testified that he considers the input of LaFlame and Rensel regarding personnel matters, the record indicates that this input is limited to factual reports about the employees' work habits and conduct. Zoldesy routinely conducts his own investigation before deciding whether or not to take action against an employee. There is no record evidence of any specific instance where Zoldesy took disciplinary action against an employee without conducting his own investigation. There is no record evidence regarding the involvement of LaFlame and Rensel in any formal evaluation of employees.

While LaFlame and Rensel have no regular involvement in the hiring of new employees, the record indicates that Rensel was hired based on LaFlame's recommendation. However, Zoldesy then observed Rensel's work for a period of time and determined to retain him. Both employees receive higher pay than their co-workers pursuant to provisions in the collective bargaining agreement(s) that require premium pay for working foreman. They do not receive any other fringe benefits that differ from other employees.

Section 2(11) of the Act defines the term "supervisor" as "any individual having the authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of merely routine or clerical nature, but requires the use of independent judgment."

The burden of proving supervisory status is on the party who alleges that it exists. **NLRB v. Kentucky River Community Care, Inc.**, 121 S.Ct. 1861, 1863 (2001) The exercise of some supervisory authority in merely routine, clerical, perfunctory or sporadic manner does not confer supervisory status. **Chicago Metallic Corp.**, 273 NLRB 1677, 1689 (1985), **aff'd. in relevant part 794 F.2 527 (9th Cir. 1986).**

Based on the above, I have concluded that the Intervenor has not met its burden of showing that these two individuals are supervisors within the meaning of the Act. It is undisputed that most of their work time is spent performing the duties of any other cement mason. Their involvement in the routine direction of work is not of the type to confer supervisory status. **North Shore Weeklies, Inc.**, 317 NLRB 1128 (1995). As the Supreme Court noted in **Kentucky River**, *supra*, there is a distinction to be drawn between employees who direct the manner of others' performance of discrete tasks and supervisors who direct other employees. The direction engaged in by LaFlame and Remsel clearly involve the former. While they have some input into the Employer's decisions on whether or not to retain or discipline employees, the evidence shows that some higher official conducts an independent investigation before deciding whether to release and employee. Accordingly, such input does not constitute supervisory authority.

Brown & Root, Inc., 314 NLRB 19, 23 (1994). To the extent that either LaFlame or Remsel may have made a single effective hiring or termination recommendation that was not investigated by higher management, such conduct is too isolated to confer supervisory status. **Intrepid Museum Foundation, 335 NLRB No. 1, sl. op. p. 13 (2001).**

In sum, I find that LaFlame and Remsel are not statutory supervisors and are therefore eligible to vote in the election directed herein.

Since the Employer is engaged in the construction industry and the record reflects that the number of unit employees varies from time to time, the eligibility of voters will be determined by the formula in **Daniels Construction Co., 133 NLRB 264 (1961)** and **Steiny & Co., 308 NLRB 1323 (1992).**

DIRECTION OF ELECTION

An election by secret ballot shall be conducted by the undersigned among the employees in the unit found appropriate at the time and place set forth in the notice of election to be issued subsequently, subject to the Board's Rules and Regulations. Eligible to vote are those in the unit who were employed during the payroll period ending immediately preceding the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike which commenced less than 12 months before the election date and who retained their status as such during the eligibility period and their replacements. Those in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period, employees engaged in a

strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced.

Also eligible to vote are those employees who have been employed for a total of 30 working days or more within the period of 12 months immediately preceding the eligibility date for the election, or who have some employment in that period and have been employed 45 working days or more within the 24 months immediately preceding the eligibility date for the election, and who have not been terminated for cause or quit voluntarily prior to the completion of the last job for which they were employed.

Those eligible shall vote whether or not they desire to be represented by: (1) Bricklayers and Allied Craftworkers Local Union No. 16; or (2) Operative Plasterers and Cement Masons International Association; or (3) Neither.

LIST OF VOTERS

In order to ensure that all eligible voters have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses that may be used to communicate with them. **Excelsior Underwear Inc.**, 156 NLRB 1236 (1966); **N.L.R.B. v. Wyman-Gordon Co.**, 394 U.S. 759 (1969). Accordingly, it is directed that an eligibility list containing the *full* names and addresses of all the eligible voters must be filed by the Employer with the Regional Director within 7 days from the date of this decision. **North Macon Health Care Facility**, 315 NLRB 359 (1994). The Regional Director shall make the list available to all parties to the election. No extension of time to file the list shall be

granted by the Regional Director except in extraordinary circumstances. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, D.C. 20570-0001. This request must be received by the Board in Washington by December 20, 2002.

Dated at Cleveland, Ohio this 6th day of December, 2002.

/s/ Frederick J. Calatrello

Frederick J. Calatrello
Regional Director
National Labor Relations Board
Region 8

440-1700